"The examiner found that Fry reduced its prices on several occasions to meet the lower published prices of its competitors, particularly those of the Ruberoid Company. But the examiner failed to take into consideration the fact that Fry made a price move on November 1, 1956, which had the effect of forcing prices downward and which was designed to permit Fry to consistently undersell its competitors. First of all, Fry deviated from its February 19, 1956, plan by granting a functional discount on all purchases made by 'distributors' even though these customers were competing with dealers in the resale of roofing products. Secondly, it granted a secret rebate of 5% to all of its distributors doing business in the Knoxville area. Fry was thus able by this maneuver to undercut its competitors while maintaining the same published prices. This evidence, together with the testimony of competitors that Fry was the price leader and further evidence that Fry initiated the price change of March 3, 1958, which reduced prices to the lowest level reached in the Knoxville area, constitutes, in our opinion, at least a prima facie showing of Fry's responsibility for the price reductions."

In the Matter of *Lloyd A. Fry Roofing Co., et al*, F.T.C. Docket No. 7908; 3 C.C.H. Trade Regulations Reporter, Par. 17,303, p. 22,441.

Each statement of fact contained in the excerpt from the F.T.C. opinion is supported by the record in this case (Ex. 31, 158a-159a, 179a-182a, 186a-190a, 369a, 681a, 755a, 787a, 1471a-1478a).

It can be stated, without fear of successful contradiction, that Lloyd A. Fry Roofing Company was the pricing leader in the asphalt roofing industry. Mr. Fry, Sr., the owner of 98% of the stock of the defendant (1560a) admitted that he initiated most of the price changes during the period under discussion (369a). It is also a fact, under this record, that even though the jury did not find a conspiracy, yet the defendant knew that the other major companies in the industry would follow his price lead. There was ample opportunity for discussion of this subject between the defendant and the other major companies at social functions held in connection with meetings of the Asphalt Roofing Industry Bureau which were attended by officers of the defendant as well as officers of practically all of the other major manufacturers in October 1955 (382a, 1690a, 1691a), in February 1956 (373a-378a, 385a, 386a), and in October 1956 (391a, 392a).

The clinching evidence demonstrating that Fry knew the other major manufacturers would follow his price lead is contained in correspondence. On February 23, 1956, four days after the effective date of defendant's price list of February 19, 1956, changing completely the pricing system in the roofing industry, Mr. J. J. Musico, manager of defendant's roofing plant at Brookville, Indiana (9b)[3], wrote to C. M. McClung & Company, a Fry customer in Knoxville as follows:

> "I know by this time that you have the new merchandising plan *which I understand the entire industry has adopted*, and it is with my very honest opinion that this will clean up all this mess and I am sure will be somewhat embarrassing to someone

[3] "b" references are to plaintiff-appellee's appendix in the Court of Appeals.

to fill all the orders that they may have and extend the payments until April 10.

* * *

"In view of the new merchandising plan, I do not think any further investigation is necessary. *I am of the firm opinion that the Roofing Industry's House should be, and will be clean, for the first time*, as certainly there is no reason for any such chiseling." (Emphasis supplied.) (Ex. 67; 9b)

Just after the price list of April 9, 1956, correcting errors in the earlier list, Mr. Musico wrote another letter to House-Hasson Hardware Company on April 13, 1956, another Fry customer in Knoxville, in which he said:

"I refer to your letter of April 9 and no doubt by this time you have received our new schedule and changes in our county zone outline.

"You will note that Blount County is now zone 2 which puts it in line and *I am sure that you will find all other manufacturers quoting on this same basis.* If you find anything quoted to the contrary, please try to pick up some tangible evidence and we will handle same." (Emphasis supplied.) (Ex. 66; 5b)

It is equally clear from this record that Fry intended to use his price fixing powers to the injury of the small independent manufacturers. This intent is clearly evidenced from the letter of Mr. Fry, Jr., to Peasley-Gaulbert Corporation dated April 27, 1956, wherein he states:

"This will acknowledge receipt of your letter dated April 24th regarding the letter you have received from Erst Long with respect to certain

prices being quoted on asphalt felt by Bear Brand at Bearden, Arkansas.

"*I am well aware of the activities of these small Arkansas Manufacturers and I assure you that we are watching them very closely.* As usual, they are taking advantage temporarily, of an attempt to stabilize an industry which is long overdue for some stabilization from the viewpoint of the wholesalers, dealers, and roofers. These people are opportunists and are much like the backwood sawmill operator who hauls a load of lumber into any given market and announces that he is a dealer.

"Nevertheless, *I agree that they are a thorn in the side and in due time will be dealt with.*

"Please advise Mr. Long that I would appreciate his patience and support of the new Merchandising Plan and Price Plan for a bit longer because there is a great deal of low-price materials in the territory which was purchased prior to the increase. The market will continue to be unsettled until these inventories have turned. I believe that this will be accomplished within thirty days. *At that time, if the menagerie is not changed there we will take corrective action.*" (Emphasis supplied.) (Ex. 68, 11b-12b)[4]

Fry's attitude is shown by the testimony of the witness Vernon Bennett, vice-president and sales manager of Tamko Roofing Company of Joplin, Missouri (698a). When that company started a new plant at Amarillo, Texas, in 1956 that location was made a basing point

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[4] The smaller roofing companies in the southwest area had names such as Bear Company, Elk Roofing Company, and Leopard Roofing Company, so that the industry referred to them collectively as the "menagerie" (327a, 1604a).

and the price was lowered (701a). The witness saw Mr. Fry, Jr., about that time and the following conversation took place:

> "I talked to him about the price situation at Amarillo, Texas, and he said that that was going to be the price down there, and I said, 'Well, I couldn't see how you could afford to have prices lower in that area,' and he said, 'I don't care whether they are, I have got nineteen plants, and my dad and myself only want a hundred thousand a year anyway'." (704a)

Selling Below Cost.

Based on data supplied by the defendant (504a-505a, Ex. 116, 1994a) it cost during the year 1958 at its Brookville, Indiana plant (the plant supplying the Knoxville area), between $1.87 and $1.986 per roll to produce asphalt felt and ship it to Knox County, Tennessee (534a). Even on the lower cost estimate, Fry was selling below cost in the Knoxville area from October 3, 1957 through the remainder of the material period, although defendant was selling at a profit in the Brookville, Indiana area (536a, and See Ex. 92A).

Mr. Jackson of Ohio Paper Company estimated that it cost his company $1.57 per roll to produce asphalt saturated felt and $0.27 per roll to deliver it to the Knoxville area, making a total cost, delivered, of $1.84 per roll (757a). Prior to 1958 the Ohio Paper Company sold a very substantial volume of asphalt felt in Tennessee (755a), however, when the price was forced down by Fry to below $1.79 a roll in the winter of 1957 and 1958, Ohio pulled out of the whole Tennessee area, because the price was below their cost of production and delivery (756a, 757a).

It cost the plaintiff Volasco $1.606 just to manufacture asphalt saturated felt and to this cost should be added the cash discounts, delivery expense, and administrative expense (498a).

Effect on Competition

In the asphalt roofing industry there are, generally speaking, two classes of manufacturers. One is the multi plant producer which distributes its products over large areas of the country and the other is the small single plant producer whose market is limited by transportation costs to a relatively small area (101a, 104a, 467a-470a).

Recognizing that the asphalt roofing business is highly competitive, yet it is interesting to note that Fry's competition with the large major producers in this industry results in low prices only in areas where small independent manufacturers are trying to get started. Defendant competed with the large major companies in all other markets in the country (1697a) and prices remained high and profitable such as at Brookville, Indiana, where it manufactured and shipped its products to Knoxville, and in Chicago where most of the major manufacturers had plants (1697a-1699a). In contrast, prices were reduced by the defendant in plaintiff's market area to below the cost of manufacture and delivery. Such "competition" as the defendant and the other large manufacturers had must have been primarily with the small independent manufacturers in the local markets. In this industry where it has been proven that the national companies maintain high prices where independent competition is lacking, the small independent company is the real competitive factor in holding prices in line. After

their elimination prices in their areas will undoubtedly rise to the level existing in the "non-competitive" areas like Chicago.

Defendant's reduction of prices in plaintiff's market area caused the plaintiff to stop its planned expansion into other lines of roofing products, to limit sales efforts to an area nearer its plant, and finally to withdraw its salesmen from the road and to fill only unsolicited orders from existing customers in order to protect its good will (550a, 551a). As a result plaintiff's sales dropped from 78,900 rolls in 1957 to 61,000 rolls in 1958 (Ex. 119, 580a, 1999a); and its profit on the sale of felt dropped from $16,697 in 1957 to a loss of $2,915 in 1958 (Ex. 171, 1367a, 2069a). The price fixed by defendant caused Ohio Paper Company to withdraw from the Tennessee market entirely thereby losing sales of 45,000 rolls of felt per year (755a-757a). It would also stand to reason that defendant's pricing would of necessity adversely affect other manufacturers selling in the Knoxville area who may not have had plants accessible to all of the high priced areas where the defendant and the large manufacturers "competed".

ARGUMENT

1. THE COURT OF APPEALS FOLLOWED THE SETTLED AND PROPER RULE OF ANTITRUST LAW

Under the proof in this record it is clear that defendant was guilty of violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. Even Fry must admit that its pricing practices were

discriminatory and it has failed to justify them on the basis of meeting competition. Defendant's whole argument in this section of its petition is to the effect that injury to an individual competitor by discriminatory pricing is not sufficient to show injury to competition. The record is clear that Fry's discriminatory pricing injured not only Volasco but drove Ohio, the other major independent competitor, out of the market. Thus the injury was not just to a competitor but to that whole segment of competition, the independent producers. As heretofore pointed out, other large competitors selling in the low priced area who may not sell in the higher priced areas would also suffer impairment of their competitive ability. See *Forster Mfg. Co. Inc. v. F.T.C.*, 335 F. 2d 47 (C.A. 1, 1964). But the act only requires that, "The effect of such discrimination *may be* substantially to lessen competition *or* tend to create a monopoly - *or* to injure, destroy or prevent competition . . ." (15 U.S.C., §13). "May be" means only that there is a "reasonable possibility" that injury to competition or lessening competition may result. *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37, 45-47 (1947).

The record shows that Volasco and Ohio Paper Company were definitely injured as competitors in the Knoxville area. We cannot believe that it was the intent of the antitrust laws not to give protection to small competitors from illegal pricing even though the large company competitors continue in business. Plaintiff has shown not merely a possibility of injury but has shown actual injury to competition.

We submit that defendant's pricing was not only discriminatory but it was established with a predatory intent. As stated by the Court of Appeals for the Tenth

Circuit in *Atlas Building Products Company v. Diamond Block and Gravel Company*, 269 F. 2d 950, "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with *predatory price cutting* which has the effect of eliminating or crippling a competitor."

See also *Puerto Rican American Tobacco Company v. American Tobacco Company*, 30 F. 2d 234 (C.A. 2, 1929); *Moore v. Meade's Fine Bread Company*, 348 U.S. 115 (1954).

In the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), it is stated on page 165:

> "Predatory price cutting designed to eliminate a small business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength."

Mr. Julian O. Von Kalinowski in an article entitled "Price Discrimination and Competitive Effects" appearing in 17 A.B.A. Antitrust Section, p. 360, at pages 362-382, discusses the elements to be considered in a primary line competition case, to determine whether the proscribed effects on competition are shown. He states that price discrimination in the form of predatory price cutting in selected areas has always been considered as "foreign to any legitimate commercial competition" (Page 366). On page 367 he points out that the intent is predatory if it is to drive a competitor out of business or cripple his competitive power, and that such intent is proven just as intent is proven in other cases, adding,

"It, of course, can also be inferred from the fact that the price cutter cut below his cost, something no reasonable person would do absent a predatory motive as we have defined it." He cites *Puerto Rican Tobacco Company v. American Tobacco Company*, supra; *E. B. Mueller and Company v. F.T.C.*, 142 F. 2d 511 (C.A. 6, 1944), and *Ben Hur Coal Company v. Wells*, 242 F. 2d 481 (C.A. 10, 1957), cert. den., 354 U.S. 910 (1957).

That defendant's pricing was established with predatory intent is clearly shown in the record by the fact that defendant's prices in Volasco's market area were lower than defendant's prices in areas near its own production plants, even substantially below defendant's cost of manufacture and delivery. Defendant's predatory intent was also confirmed in writing when Mr. Fry, Jr., President of the defendant, stated in his letter to Peasley-Gaulbert Corporation that he was watching the small Arkansas manufacturers very closely and *"I agree they are a thorn in the side and in due time will be dealt with"*; and that if their pricing did not fall in line within thirty days *"at that time if the menagerie is not changed there we will take corrective action."* (Ex. 68, 12b).

That defendant's actions had the intended effect is clearly shown from the record.

Petitioner argued below, and takes the position here in its statement of the case, that in order for defendant to be held liable, plaintiff must show that it lost customers to the defendant. Defendant cites no authority for such a position and we have been wholly unable to find any. On the other hand, the Federal Trade Commission in its recent decision very effectively disposed of this argument in the following language:

"The examiner has also held that complaint counsel failed to show that Volasco lost sales to Fry rather than to the other majors selling in the Knoxville area and that consequently there is no causal connection between the injury sustained by Volasco and Fry's discriminatory prices. In so holding the examiner seems to take the position that a price discrimination cannot have the prescribed effect on competition unless there is a showing that trade is diverted from the alleged victim to the discriminator. We do not agree. While diversion of trade or loss of customers are factors to be considered in determining whether a discrimination will have the prescribed effect on competition, they cannot be equated with such competitive injury. As the 7th Circuit held in *Anheuser-Busch, Inc. v. F.T.C.*, 289 F. 2d 835 (1961), '§ 2(a) is not concerned with mere shifts of business between competitors'. It is concerned with injury to the health or vigor of competition, including injury to a single firm's ability to compete. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; *Atlas Bldg. Products Co. v. Diamond Block and Gravel Co.*, 269 F. 2d 950 (1959); *Maryland Baking Co. v. F.T.C.*, 243 F. 2d 716 (1959); *E. B. Muller and Co. v. F.T.C.*, 142 F. 2d 511 (1944). In *Porto Rican American Tobacco Co.*, *supra*, brought under the original Clayton Act, the court found injury from evidence that the plaintiff was required to sell at a loss in order to meet the defendant's lower discriminatory price."

In the Matter of *Lloyd A. Fry Roofing Co., et al*, F.T.C. Docket No. 7908, 3 C.C.H. Trade Regulations Reporter, Par. 17,303, p. 22,440.

2. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE AND THE DECISION OF THE SEVENTH CIRCUIT IN THE CASE OF *ANHEUSER BUSCH, INC. v. F.T.C.*, 289 F. 2d 835

The holding of the Seventh Circuit in the *Anheuser-Busch* case is entirely consistent with the holding of the Sixth Circuit in the instant case. In this case there is evidence of a predatory and punitive intent on the part of Fry in reducing its prices and the evidence further shows that it reduced its price below cost. There is no issue in the *Anheuser-Busch* case on the question of selling below cost and the Court expressly distinguished its holding from the holdings in other cases because no predatory intent was charged against Anheuser-Busch, in the following language at page 842:

> "The record affirmatively shows that AB used restraint in its competitive efforts. Its conduct was in conformity with the principle that competition is the decisive force in the marketplace. That conduct is the antithesis of the predatory misconduct condemned in the above territorial pricing cases relied on by the Commission. In each of those cases the motive for the price cut was vindictive and the effect was punitive. There was not even a pretense that the price change was incident to a general intensification of the sales effort, as in the case at bar. It was a single lethal weapon aimed at a victim for a predatory purpose."

The Sixth Circuit in this case merely held that there was sufficient evidence to submit to the jury the question of violation by Fry of Section 2(a) of the Clayton

Act. Defendant sought on its appeal, and seeks in this Court, to persuade the appellate courts to weigh the evidence, a function entirely within the province of the jury.

As a matter of fact, in the case of *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), wherein this Court laid down the guidelines for the decision of the Seventh Circuit in the case relied upon by defendant as creating a conflict between the Circuits, this Court remarked at page 552, "For example it might be argued that the existence of predatory intent bears upon the likelihood of injury to competition, and that a price reduction below cost tends to establish such an intent."

There is nothing in the holdings of the courts in either of the cases cited by defendant, *Balian Ice Cream Co. v. Arden Farms Co.*, 105 F. Supp. 796 (S.D. Cal. 1952), *aff'd* 231 F. 2d 356 (C.A. 9, 1955), *cert. denied* 350 U.S. 991 (1956); *Gerber Products Co. v. Beachnut Life Savers*, 160 F. Supp. 916 (S.D. N.Y. 1958), and *Continental Baking Co. v. Utah Pie Co.*, ... F. 2d ... (C.A. 10, 1965), C.C.H. Tr. Reg. Rep., Vol. 5, §71,468 (May 28, 1965), which in any way conflicts with the holding of the Sixth Circuit on the facts of this case.

3. THERE WAS NO DEPARTURE FROM THE ACCEPTED AND USUAL MODES OF JUDICIAL PROCEDURE IN THE TRIAL OF THIS CAUSE

Evidence as to the effect of defendant's pricing practices on other independent companies as well as their effect upon plaintiff is certainly competent. Mr. Krug testified that Webcote established a plant at Meridian, Mississippi in the fall of 1955 about the

same time Volasco went into business (611a, 612a). Fry's pricing policies resulted in prices in the Webcote area always being in the lowest price zone (612a; Ex. 24, 156a). Mr. Krug further testified that his company, starting in September 1958, bought shingles and roll roofing from Webcote and that he did so until the summer of 1959 when it went into bankruptcy and stopped production (613a-614a). In view of the low prices imposed upon plaintiff's market area by the defendant, which were below defendant's cost of production and delivery, below Ohio Paper's cost of production and delivery and below that of plaintiff, in view of the fact that defendant maintained even lower prices in Webcote's market area, in view of the threat made by defendant's president that if the small independent companies did not come in line within 30 days after April 27, 1956, "We will take corrective action" (Ex. 68, 12b)——in view of all these circumstances, it was clearly competent to show what happened to the other independent manufacturers of asphalt roofing products. An inference clearly arises that the predatory pricing practices of defendant had an adverse effect upon its small competitors.

The same is true of Mr. Krug's testimony concerning Ohio Paper Company, which had withdrawn from selling in Tennessee in the winter of 1957 and 1958 because of the low prices. Volasco had been buying dry felt from them (610a). Mr. Krug testified from his own knowledge that Ohio had gone into reorganization and finally closed its doors in July or August of 1963 (609a, 610a).

The statement in the petition that Messrs. Pharis and Graham, presidents of Webcote or Leopard, had testified that the progress of their company was satisfactory until they manufactured defective shingles and

that the claims resulting precipitated bankruptcy is not borne out by the excerpts from the testimony of these two witnesses quoted in the exhibit to the affidavit of counsel for the defendant appearing in the record at pages 2134a through 2142a. While the witness Pharis said the business was progressing satisfactorily and he believed that they would have "made it" but for the shingle problem he added, "A. It was my opinion; yes, sir. You will get an entirely different story from these gentlemen, I am sure." (2138a).

The witness Graham's testimony is entirely unclear. The transcript reads:

> "Q. One more question along the lines of the question I just asked you. In your opinion, as a director and as an officer of these three companies, would you state that the companies would not have been forced into bankruptcy had it not
>
> * * *
>
> "(38) A. No, sir." (2141a-2142a)

Neither is it true, as stated in the petition, that Webcote was represented, "By the same counsel that represented Volasco", at the time of the taking of these depositions (2145a-2146a).

In reply to defendant's summary, we would say:

(a) The testimony complained of was not improper.

(b) The Trial Court did not rule it improper, but overruled defendant's objection to it (See Record page 613a).

(c) The Court's admonition to the jury regarding its consideration of this testimony was entirely adequate.

(d) Volasco's counsel did not represent Webcote and did not know of the testimony given by its presi-

dents in another case (2145a-2146a).

(e) Fry made no attempt to meet this evidence.

It is therefore respectfully submitted that the Trial Court was not in error in permitting this testimony to remain in the record, particularly under its charge to the jury. Even assuming however, that the testimony was incompetent, the Court of Appeals correctly applied Rule 61 of the Federal Rules of Civil Procedure when it stated:

> "In view of other competent evidence of the harmful effect on competition due to the defendant's pricing policies, there was no denial of substantial justice. (Rule 61, Federal Rules of Civil Procedure.)" 346 F. 2d 661, 665.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the Court of Appeals was correct and in accordance with established precedents and the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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